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In The

Supreme Court of the United States

October Term, 1951

No.

Paul Ginsburg,

Petitioner,

v.

John D. Black; John C. Slade; Frank H. Towner; Guy Allen Gladson; Edward G. Ince; James H. Cartwright; Harold Armstrong Smith; Fred J. McManus; Bryce L. Hamilton; Reuben A. Borsch; Douglas C. Moir; James D. Head; Gerard E. Grashorn; George W. Ott; Grier D. Patterson; Walter A. Wade; Paul H. Moore; Charles J. Calderini; George B. Christensen; Thomas I. Underwood; Arthur D. Welton, Jr.; Thomas A. Reynolds; Frank B. Gilmer; Robert McDougal, Jr.; Albert W. Potts; William C. Mulligan; Thomas S. Tyler; Neal J. McAuliffe; Robert Tieken; doing business as Winston, Strawn, Shaw and Black; Alfred L. Kuehn and United States Creosoting Company, a corporation,

Respondents.

Paul Ginsburg,

Petitioner,

v.

The First National Bank of Chicago, and Alfred L. Kuehn,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Paul Ginsburg respectfully prays that a writ of certiorari issue in the above-captioned cases to review the judgments of the United States Court of Appeals for the Seventh Circuit rendered therein (First Nat. R. 9; Black, R. 48) November 28, 1951, Petition for Rehearing denied December 19, 1951 (First Nat., R. 65; Black, R. 57).

Opinions Below

The United States District Court for the Northern District of Illinois rendered no opinion. The opinions of the United States Court of Appeals for the Seventh Circuit are reported in 192 F. 2d 823, 826, and appear in the record (Black) at R. 44 and (First Nat.) R. 57.

Jurisdiction

The jurisdiction of this Court is invoked under § 1254 of the Judicial Code.

The court of appeals denied petitions for rehearing with a memorandum in the respective cases (First Nat., R. 65; Black, R. 57) on December 19, 1951. Time within which petition for writ of certiorari might be filed by this petitioner expires, therefore, March 18, 1952.

Questions Presented

In an action for libel in a federal district court sitting in Illinois, the libel having been committed in Kentucky, and defendants having moved without answering the complaint to dismiss or to strike it on grounds the words were privileged because used in a pleading in the Kentucky state court, may the district court, consistently with *Erie R. Co.* v. *Tompkins,* 304 U. S. 64—

1. Misapply the Kentucky law through holding that the libelous words, which related to plaintiff's motive in instituting the proceeding, were pertinent and hence privileged, where the Kentucky law is that motive of a litigant is never pertinent?

2. Fail to follow the Illinois law, which though procedural in form is substantive in fact, with respect to the necessity of pleading and proving as matter of fact the pertinency of the words spoken under claim of privilege of judicial proceedings, thereby ignoring the gloss on the *Erie* doctrine contained in *Sampson* v. *Channell* (C. A. 1, 1940), 110 F. 2d 754, 128 A.L.R. 394, cert. den. 310 U. S. 650 (No. 976 O. T. 1939)?

Statement

Petitioner is an attorney at law and a member of the bar of this Court, and of the Supreme Court of Pennsylvania and other courts, and of various bar associations (R. 3-4).[1] In February, 1950, there was pending in a Kentucky state court a case involving approval of sale by trustees of an estate or trust of certain shares of stock in American Creosoting Company. One of the trustees of the estate was Alfred L. Kuehn (R. 9); he was also president of the nominal purchaser, United States Creosoting Company, sale to which was tantamount to sale to him (R. 10); he was president of American Creosoting Company, sale of whose shares by the trustees was in question (R. 9); and he claimed to be the optionee of the shares to be sold (R. 9). Originally he had offered $2 million for the shares; thereafter $3.8 million at which price it was proposed to approve the sale, even though

[1] Where there is no substantial difference in the two records presented herewith, no separate identification as "Black" or "First Nat." is inserted with the record reference. In such cases, references are to the record in the *Black* case.

the shares were worth more if freed from his alleged option (R. 8).

In such circumstances, petitioner filed with the Kentucky Court of Appeals a petition for his appointment as *amicus curiae* in the proceedings (R. 4, 7-11), in which he set forth that Kuehn's option was invalid by reason of lack or failure of consideration, undue influence of Kuehn on the decedent, conflicting interest of the trustee-optionee-purchaser, and that the sale ought not be approved by reason of Kuehn's failure to prove the validity of the option, or the fairness or adequacy of the purchase price in the probate court. He alleged that if appropriate opportunity were accorded, a substantially greater price for the shares might be obtained by the trustees.

One of the trustees, represented by Messrs. Winston, Strawn, Shaw and Black (also respondents to this petition) filed objections to the petition in the Kentucky court, in the course of which it was said of petitioner:

> "Under such circumstances, the attempt of this interloper to get himself into a position where he might hope to be bought off should not be assisted by any court." (Black, R. 15; see also *id.*, R. 12.)

Other objecting parties, some of whom are respondents in the second record, included the following assertion in their objections:

> "6. He is a mere interloper, without standing in this court, presumably looking for an opportunity to collect a fee in a case in which he has no interest whatever, either personally or as an attorney." (First Nat., R. 13.)

Petitioner brought these actions for libel in the United States District Court for the Northern District of Illinois, E.D., based on diversity of citizenship. (R. 3.) To the actions, motions to strike (Black, R. 16) or dismiss (First Nat., R. 23) were filed by respondents and sustained by the court without opinion.

The motions to dismiss admitted the matters above referred to, together with the following allegations of the complaints: Respondents charged in the Kentucky proceeding that petitioner is an interloper and is seeking to be bought off or is looking for an opportunity to collect a fee in a case in which he had no interest whatever, either personally or as an attorney. These statements in that proceeding are wholly and completely false and contrary to fact, were made without a scintilla of evidence to indicate their truth and without probable cause to induce belief in their truth in a reasonable man; were malicious, and were made wilfully and maliciously with the purpose of injuring petitioner, who bears a good name and reputation, in the lawful practice of his profession, and as a result of the words quoted, petitioner was injured in his good name, fame and reputation, and was injured in the practice of his profession. (R. 5)

Respondents in their motions to strike or to dismiss asserted among other things that the statements made in the state proceedings in Kentucky were "absolutely privileged". The ground relied upon by the District Court in dismissing the complaint merely on motion and prior to answer is not disclosed, since the court announced no opinion. However, the Court of Appeals (R. 44) regarded this defense of absolute privilege as properly applicable. It conceded (R. 45) that to be privileged, the statement must be pertinent or relevant to the cause at issue; but it felt that it is clear that Kentucky has adopted the rule of absolute privilege protecting the lawyer and his client from suits for libel with respect to statements made in legal proceedings "if the statements have some relationship to the matter before the court" (R. 46). It regarded the question of pertinency or relevancy of the language used in the Kentucky proceedings to be a question of law for the court, and the test to be whether what was said has reference and relation to the subject matter of the

action. Since petitioner's appointment as *amicus curiae* was discretionary in the sense of being addressed to the "uncontrolled discretion of the court", it felt that the statements here complained of were pertinent or relevant to the issue raised and hence were privileged. (R. 47.)

Reasons for Granting the Writ

1. The court below erroneously interpreted the applicable state law under the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. This being a diversity case with no federal question involved, the federal district court in Illinois was under the duty to apply the same substantive law that would have been applied if (but for the accident of diversity) the action had been brought in an Illinois state court. *Erie R. Co.* v. *Tompkins,* supra. That applicable law includes Illinois conflicts-of-law rules. *Sampson* v. *Channell* (C. A. 1, 1940), 110 F. 2d 754, cert. den. 310 U. S. 650, No. 976 O. T. 1939. Being an action upon a foreign tort, the Illinois conflicts rules would call for the application of *lex locus delictu,* that is to say, the law of Kentucky, *Whitney* v. *Madden,* 400 Ill. 185, 79 N. E. 2d 593, cert. den. 335 U. S. 828, No. 220 O. T. 1948.

As revealed by its opinion, the court below purported to apply Kentucky law to the case. But the *Erie* rule obviously requires more than that: The court must actually apply Kentucky law, not reach a decision in conflict with it. The court below correctly stated the general proposition of Kentucky law that the defamatory material published in judicial proceedings, *if pertinent,* is absolutely privileged; but in deciding that the libelous declarations in this case were pertinent, the courts below did violence to the well-settled proposition of Kentucky law that motive for seeking judicial action is not a pertinent matter. The court below in its opinion (Black, R. 47) stated that whether in his petition to the Kentucky court for appointment as *amicus curiae* petitioner was

motivated by a "purpose of assisting the court or for the purpose of private gain *was vitally material.*" (Italics added.) Yet the Kentucky courts have uniformly held, in accordance with the generally-accepted rule, that motive in seeking judicial action is not a pertinent matter for inquiry. *Spaulding* v. *Ghent*, 10 Ky. Law Rep. 776 (1889); *Louisville Ry. Co.* v. *Frey*, 166 Ky. 24, 178 S. W. 1137; *City of Hickman* v. *First Nat. Bank*, 307 Ky. 702, 708, 211 S. W. 2d 801 (1948); *Dismans* v. *Flippins' Adm'r.*, 116 S. W. 740 (Ct. of App. Ky., 1909). As was said in the *Dismans* case, *supra*:

> "• • • her motive in bringing the suit is immaterial. That she may have contemplated oppressing or humiliating appellant is not a matter that can be cognizable in the courts, so long as she acted within her legal right." p. 742.

That petitioner was acting within his legal right in petitioning the court for appointment as *amicus curiae* is not open to doubt. True, he had no legal right to be appointed *amicus curiae*, but that is a different matter, and does not detract from the fact that he was within his legal right in petitioning for appointment. The pertinent scope of inquiry was whether or not the court thought on the basis of the facts before it, prudent handling of the trust estate would be advanced by the recognition of petitioner and the assistance which he tendered. Many considerations might properly influence the determination—whether there was risk to the trust *res* from further consideration of the merits of the proposed sale; the reasonable chances of an increased return as a result of petitioner's efforts as opposed to the delay and expense resulting from granting his petition; whether the sale was a bird in hand as opposed to two in the bush; whether there was perfidy in the self-dealing of a trustee. Instances might be multiplied. But in that determination petitioner's personality and motives simply were not in-

volved. Nevertheless, respondents admittedly, maliciously and falsely attributed to him motives which would subject him to disrepute in his profession—trying to put himself in a position where he would hope to be "bought off" which, as to an attorney, it has never been doubted in this proceeding is libelous in Kentucky and anywhere else.

This misapplication of the Kentucky law on the pertinency of motive was clearly prejudicial. If the attacks upon petitioner's motives were pertinent under Kentucky law, then the libel was absolutely privileged, however one might view the ethics of attorneys' (among others, of respondents) making malicious and false charges against another member of the bar. But if petitioner's motives were not pertinent there is no cloak of privilege to protect respondents, and for a federal court in Illinois to dismiss petitioner's case was to deny him the result which both the Illinois and Kentucky law directed. Under the *Erie* rule, that disposition should be reversed.

2. The court below violated the rule of *Erie R. Co.* v. *Tompkins* in disposing of the issue of pertinency as a question of law on a motion to strike. As noted above, the *Erie* rule required the district court to apply to the case the substantive law of the State of Illinois, including its conflicts-of-law rules, to the end that the result reached would not be affected by the accident of a federal forum due to diversity of citizenship. The district court was faced with the problem whether the issue of pertinency as an element of absolute privilege in a libel action could be disposed of on a motion to dismiss or strike, or whether it was an affirmative defense which could only be disposed of after a responsive pleading raising it as such.

This was the kind of question which might be characterized as "procedural" for some purposes. But like presumptions and burden of proof, here the answer is likely to work fundamental differences in result. It follows that

for purposes of the *Erie* rule it must be treated as a question of substance calling for the application of state law. *Sampson* v. *Channell, supra.* The problem, then, was—Would an Illinois state court have treated the issue of pertinency as one to be raised by affirmative defense or as an issue subject to disposition upon motion to strike? The result that would be reached under Illinois law is complicated by the fact that the Illinois courts would be faced with this case as a conflicts-of-law case, the tort having occurred in Kentucky. Illinois would look to the *lex locus delictu* for the substantive law of tort (*Whitney* v. *Madden, supra*), but for what, under its conflicts rules, the Illinois court would characterize as "procedural", the Illinois court would look to its own rules, and this kind of a problem would have been characterized as "procedural" and controlled by Illinois domestic rules. *Mithera* v. *Jeffery,* 259 Ill. 373, rev'g. 174 Ill. App. 602. Therefore, in deciding whether the issue of pertinency could be disposed of summarily on motion or whether it must be raised by affirmative defense, the District court should have looked to Illinois domestic law as controlling.

To paraphrase the learned opinion of Judge Magruder in *Sampson* v. *Channell, supra,* "This result may seem to present a surface incongruity, viz., the deference owing to the substantive law of Illinois as pronounced by its courts requires the federal court in that state to apply an Illinois rule as to manner of raising defense which the highest state courts insist is procedural only. The explanation is that reasons of policy, set forth in the *Erie* rule, make it desirable for the federal court in diversity cases to apply the state rule, because the incidence of the issue involved is likely to have a decisive influence on the outcome of litigation." Cf. 110 F. 2d 754 at p. 762.

Under Illinois law the issue of pertinency as an element of privilege raises an affirmative defense to be established by evidence. In *Maclaskey* v. *Mecartney,* 324 Ill.

App. 498, 58 N. E. 2d 630, where the trial court had directed a verdict sustaining the claim of privilege, it was stated thus in the opinion reversing that action:

> "In the instant proceeding the joint plea of defendants is that all of the pleadings filed in the Municipal court proceeding were privileged. Defendants did not plead that the charges contained in the pleadings in the Municipal court proceedings were relevant or material to the issues in that proceeding, nor did they even plead that they believed them to be relevant and material when they were filed, nor did they offer any evidence to prove that the charges were relevant. If defendants in good faith believe that the charges were material and pertinent to the issues, *such a defense should be an affirmative one, to be established by evidence.*" (Pp. 509-510. Italics added.)

That the district court did not correctly apply this rule of Illinois law to the case is apparent by the result reached. Had the Illinois law been correctly applied, as required by the *Erie* rule, the defense of privilege could only have been decided after a responsive pleading and the hearing of evidence on the issue of pertinency.[2]

Conclusion

The petition should be granted.

JOHN W. CRAGUN,
CARL S. HAWKINS,
Counsel for Petitioner.

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[2] This is not to be confused as a contention that privilege is a question of fact. Whether or not, and under what conditions, an occasion will be privileged is uniformly understood to be a question of law. But its resolution, insofar as it turns upon the facts controlling pertinency, can come, in Illinois, only after taking evidence to establish the fact upon which pertinency turns. Yet the Court of Appeals for the Seventh Circuit in its opinion (Black, r. 46) sanctioned the erroneous decision of the district court that "The question whether defamatory matter contained in a pleading is or is not pertinent or relevant to the cause is never left to the jury, but is a question of law for the court."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

Nos. 654, 655

PAUL GINSBURG,

Petitioner,

vs.

JOHN D. BLACK, ET AL.,

Respondents.

PAUL GINSBURG,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF CHICAGO, and ALFRED L. KUEHN,

Respondents.

ANSWER TO PAUL GINSBURG'S PETITION FOR WRIT OF CERTIORARI ON BEHALF OF ALL RESPONDENTS OTHER THAN THE FIRST NATIONAL BANK OF CHICAGO.

GUY A. GLADSON,
Attorney for Respondents other than The First National Bank of Chicago.

JAMES H. CARTWRIGHT AND
EDMUND J. KENNY,
Of Counsel.

THE SOUTHERN-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

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PAUL GINSBURG,

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vs.

JOHN D. BLACK; JOHN C. SLADE; FRANK H. TOWNER; GUY ALLEN GLADSON; EDWARD G. INCE; JAMES H. CARTWRIGHT; HAROLD ARMSTRONG SMITH; FRED J. McMANUS; BRYCE L. HAMILTON; REUBEN A. BORSCH; DOUGLAS C. MOIR; JAMES D. HEAD; GERARD E. GRASHORN; GEORGE W. OTT; GRIER D. PATTERSON; WALTER A. WADE; PAUL H. MOORE; CHARLES J. CALDERINI; GEORGE B. CHRISTENSEN; THOMAS I. UNDERWOOD; ARTHUR D. WELTON, JR.; THOMAS A. REYNOLDS; FRANK B. GILMER; ROBERT McDOUGAL, JR.; ALBERT W. POTTS; WILLIAM C. MULLIGAN; THOMAS S. TYLER; NEAL J. McAULIFFE; ROBERT TIEKEN; doing business as Winston, Strawn, Shaw and Black; Alfred L. Kuehn and United States Creosoting Company, a corporation,

Respondents.

PAUL GINSBURG,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF CHICAGO, and ALFRED L. KUEHN,

Respondents.

ANSWER TO PAUL GINSBURG'S PETITION FOR WRIT OF CERTIORARI ON BEHALF OF ALL RESPONDENTS OTHER THAN THE FIRST NATIONAL BANK OF CHICAGO.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The respondents other than The First National Bank of Chicago respectfully request that the Petition of Paul Ginsburg for a writ of certiorari in the above captioned cases be denied.

STATEMENT.

The petition herein merely seeks a further review of matters fully argued and disposed of in both the District Court and in the Court of Appeals for the Seventh Circuit.

A libel suit brought by Paul Ginsburg in the District Court of the United States for the Western District of Kentucky, identical in all respects with the case against The First National Bank of Chicago and Alfred L. Kuehn here involved, except as to the defendants named therein, was dismissed by the District Court upon the pleadings, and that judgment was affirmed by the United States Court of Appeals for the Sixth Circuit on February 18, 1952, without an opinion, on the grounds set forth in said judgment. Since neither the District Court judgment nor the Court of Appeals order is published, we print, as an appendix hereto, the judgment order in the District Court and

the affirming order of the Court of Appeals for the Sixth Circuit.

Thus, the petitioner has not only presented his contentions to the District Court for the Northern District of Illinois, Eastern Division, and to the Court of Appeals for the Seventh Circuit, but also to the District Court for the Western District of Kentucky and to the Court of Appeals for the Sixth Circuit, and all four courts have decided that the language complained of was pertinent and material to the issues raised on the petition for appointment as *amicus curiae* under Kentucky law, and that, since absolute privilege appeared upon the face of the pleadings, it was proper to dispose of the cases on the pleadings and without any further hearing upon the merits.

Petitioner seeks to bring himself within the language of Rule 38, 5(b) that certiorari may be granted:

> "Where a circuit court of appeals * * * has decided an important question of local law in a way probably in conflict with applicable local decisions; * * *"

As to the Kentucky law, the petitioner contends that the Court of Appeals was in error in determining that Mr. Ginsburg's *motive* in trying to inject himself into the Kentucky litigation was directly material and relevant, and as to Illinois law, the petitioner contends that, no matter how clearly absolute privilege appears upon the face of the pleadings, the court cannot dispose of the matter without taking evidence to establish the pertinency of the language complained of.

The petitioner is wrong as to both the Kentucky and the Illinois law, but to determine these issues this court would have to examine Mr. Ginsburg's petition for appointment as *amicus curiae* and the answers thereto, copies of which were attached to the complaint in both of these cases, and determine for itself whether or not under the particular

facts of these cases the language complained of was in fact pertinent and relevant, and whether or not, in the light of such pertinency and relevance, the complaints should have been dismissed.

The issues herein are of importance only to the litigants and could not be binding in any other litigation involving any other circumstances or any other complained of language. The petitioner utterly fails to bring himself within any class of cases in which this court will grant certiorari.

PETITIONER'S MOTIVE FOR TRYING TO INJECT HIMSELF INTO THE KENTUCKY LITIGATION WAS PERTINENT, AND STATEMENTS WITH REFERENCE THERETO WERE PRIVILEGED.

The Court of Appeals of Kentucky has never decided, in so many words, whether the motive of one applying for appointment as *amicus curiae* is or is not pertinent to the consideration of the petition. However, in this very case the Kentucky Court of Appeals sought for a legitimate motive upon the part of Mr. Ginsburg and found none, stating in its opinion (*Robertson, et al.* v. *Hert's Administrators, et al.*, 312 Ky. 405, 227 S. W. (2d) 899, 904) (Printed Record in Case No. 655, p. 23):

> "His [Ginsburg's] motion does not state that he represents any of the parties in interest or that he knows or represents a bidder who will pay more than $3,800,000 for the stock in question. On the contrary, he insists no fair sale of the stock may be had while Kuehn holds an option to purchase same and he asks that the case be referred back to the Jefferson Circuit Court to receive bids for sixty days from persons desiring to purchase the stock."

In a subsequent memorandum opinion when Mr. Ginsburg tried to have the mandate recalled, the Kentucky Court of Appeals overruled his motion "for the reason

that the said Paul Ginsburg is neither a party nor attorney for any party to this proceeding, and is not shown to have any personal interest in the subject matter involved in this cause" (Printed Record in Case No. 655, p. 24).

Thus, if Mr. Ginsburg had had a legitimate motive for injecting himself into the case, and had stated what that motive was, it would have been highly pertinent. It was pertinent for the parties to point out that he did not have a legitimate motive, and equally pertinent to point out that his only apparent motive was an illegitimate one.

A litigant's motive in bringing suit upon a note or in defending such a suit, or his motive in failing to pay a bill and defending a suit brought for its collection is utterly immaterial. A person's motive in attempting to overturn a family settlement or in starting libel suits is irrelevant and immaterial in determining his right to relief. Such are the cases cited by the petitioner. The same rule is never applied when the litigant is attempting to get the court to act favorably toward him in a purely discretionary matter. There are no cases in Kentucky discussing this question directly, but cases in other jurisdictions uniformly hold that when a litigant is asking the court to grant him a favor, rather than to enforce a right, it is legitimate to inquire what the litigant's reason may be for asking the favor, and that any statement which a respondent to such a request may consider might properly influence the tribunal to grant or withhold the favor is material and relevant. *People* v. *Warden of City Prison*, 258 N. Y. 55, 179 N. E. 257; *Parker* v. *Kirkland*, 298 Ill. App. 340, 18 N. E. (2d) 709, *Brown* v. *Shimabukuro*, 118 Fed. (2d) 17 (C. A. of D. C.); 1 C. J. S. 1064, 1065; 1 Am. Jur. 416.

Nothing is more purely discretionary with a court than the granting or denial of a petition for appointment as

amicus curiae, and the determination of a petitioner's purpose in seeking such appointment is "vitally material" under Kentucky law or any other law of which we know. As pointed out above, the Kentucky court in this very case searched Mr. Ginsburg's petition for a legitimate motive on his part and found none.

SINCE ALL THE ELEMENTS OF ABSOLUTE PRIVILEGE APPEAR UPON THE FACE OF THE COMPLAINTS, IT WAS PROPER TO DISMISS THE CASES UPON MOTION WITHOUT REQUIRING AN ANSWER OR A HEARING.

In Illinois, all matters which formerly would have been raised by demurrer are now raised by motion (Ill. Rev. Stat., Chap. 110, Sec. 169).

It would seem to be fundamental in pleading that if language claimed to be libelous was used in a court proceeding by a litigant or his counsel, and it appeared affirmatively from the complaint that the complained of matter was pertinent to the issue then pending, the complaint would be vulnerable to a demurrer, or the more modern motion to dismiss. To establish the contrary the petitioner misuses some language from the case of *Maclaskey* v. *Mecartney,* 324 Ill. App. 498, 58 N.E. (2d) 630, and upon the basis thereof contends that under Illinois law pertinency and materiality can never be shown by the plaintiff's complaint, but must be pleaded and proven by the evidence. The case holds no such thing. In that case Ethel Maclaskey had previously sued Mecartney and Kurz for a balance due for court reporting services. In response, Mecartney filed pleadings on behalf of himself and Kurz which charged the plaintiff with adultery, incompetence and dishonesty in other matters. The plaintiff obtained judgment and then sued Mecartney and Kurz for libel. The trial court in the libel case excluded most of the pleadings in the earlier suit and

at the close of all the evidence directed a verdict for the defendants.

The Appellate Court reversed the trial court and remanded the cause, saying at page 637 of the Northeastern:

> "The trial court was also of the opinion that the 'Interrogatories Propounded' were competent as tending to show the interest and the relationship between the parties. The plain purpose of the interrogatories was to insinuate that plaintiff had been guilty of adultery with one Mulks. *We cannot imagine how such a fact could be competent in the simple suit filed by plaintiff against Kurz, especially in view of the fact that no counterclaim was filed. A fortiori,* the joint plea of defendants did not allege that the statements made in any of the pleadings filed in the Municipal court proceeding were relevant to the issues in the cause." (Emphasis supplied.)

In that situation the court said, as quoted by petitioner:

> "If defendants, in good faith, *believed* that the charges were material and pertinent to the issues, such a defense would be an affirmative one, to be established by evidence." (Emphasis supplied.)

In that case the complained of language appeared on the face of the complaint to have *no* relation whatever to the issue of liability for the reporter's bill. If the defendants, in good faith, *believed* that such charges were pertinent they should have pleaded facts to establish the pertinency.

Illinois cases dealing with situations like the present where pertinency appears affirmatively from the complaint, holding that it is proper in such cases to attack by demurrer or motion to dismiss, are: *Ash* v. *Zwietusch,* 159 Ill. 455, 42 N.E. 854; *Schwender* v. *Smith,* 152 Ill. App. 436; and *Parker* v. *Kirkland,* 298 Ill. App. 340, 18 N.E. (2d) 709.

In the latter case the court said at page 715 of the Northeastern:

"Under the well settled rules of pleading in this state this count (one for slander before a Board of Tax Appeals) is vulnerable to a motion to dismiss which under the Practice Act takes the place of the former demurrer."

Conclusion.

We respectfully contend that the Court of Appeals for the Seventh Circuit properly affirmed the order of the District Court dismissing petitioner's various complaints, and in so doing properly determined both the law of Kentucky and the law of Illinois. But even if it had failed to properly determine the law of those two states, the cases are of no interest to any one other than the parties thereto. They do not fall within the class of cases in which this court will grant certiorari. As evidencing the lack of general interest in the subject matter of these cases, we point to the fact that the Circuit Court of Appeals for the Sixth Circuit did not even write an opinion in affirming the District Court.

We respectfully request that the petition for certiorari herein be denied.

Respectfully submitted,

Guy A. Gladson,

Attorney for respondents other than The First National Bank of Chicago.

James H. Cartwright,
Edmund J. Kenny,
Of Counsel.

APPENDIX.

UNITED STATES DISTRICT COURT

For the Western District of Kentucky.

PAUL GINSBURG, *Plaintiff,* *versus* CITIZENS FIDELITY BANK AND TRUST COMPANY, C. R. ALEY, W. R. COBB, J. MATT CHILTON; and WILLIAM MARSHALL BULLITT, CHARLES I. DAWSON, JOHN E. TARRANT, R. LEE BLACKWELL, THOMAS W. BULLITT, EARL S. WILSON, THOMAS S. DAWSON, BERNARD H. BARNETT, RICHARD M. DAWSON and GERALD KIRVEN, doing business as BULLITT, DAWSON and TARRANT, *Defendants.*	Civil Action No. 2063.

JUDGMENT.

This cause coming on for hearing on Paragraph 3 of the answer of the defendants, alleging that the complaint fails to state any claim upon which relief can be granted, and the Court having considered the allegations of the complaint and the exhibit referred to and incorporated therein as "Appendix 1," consisting of a copy of the document entitled "Petition for Appointment of Amicus Curiae and Specific Relief," filed by the plaintiff in the Court of Appeals of Kentucky in an action pending therein wherein William Robertson, *et al.* were the appellants and Citizens Fidelity Bank & Trust Company and C. R. Aley, Administrators, *et al.* were the appellees, and the exhibit referred to and incorporated therein as "Appen-

dix 2," consisting of a copy of a document entitled "Objections to the Filing of the Petition of Paul Ginsburg for Appointment as Amicus Curiae and Specific Relief," filed by the defendant members of the law firm of Bullitt, Dawson & Tarrant in behalf of their co-defendants herein in opposition to said Petition for Appointment of Amicus Curiae and Specific Relief filed by plaintiff in said cause pending in the Court of Appeals of Kentucky, and the Court having heard arguments of counsel and considered the memorandum briefs filed by plaintiff, and being fully advised, finds that plaintiff's complaint, considered with the said two exhibits filed therewith, affirmatively discloses: (a) that the alleged libelous words complained of were contained in a pleading regularly and properly filed in a then pending legal proceeding in which each of the defendants, other than the defendants named as members of the law firm of Bullitt, Dawson & Tarrant, was a party, and in which the members of said law firm were counsel for the other defendants herein in whose behalf said pleading was filed; (b) that the plaintiff was not a party to the legal proceeding in the Court of Appeals hereinabove referred to, was not of counsel for any party, and had no interest whatever in the subject matter of that litigation; and (c) that the language complained of was pertinent, material and had a substantial relation to the issues involved in the proceeding in which said pleading was filed.

It is accordingly adjudged: (1) that the alleged libelous words complained of were not in fact libelous, but amounted to no more than a fair and reasonable conclusion fairly deducible from the facts expressly alleged or clearly implied in plaintiff's petition for appointment as amicus curiae and for specific relief; (2) that the words complained of were unconditionally privileged, irrespective

of their alleged libelous character; and (3) that Paragraph 3 of the answer presents a complete defense to the cause of action set out in plaintiff's complaint, and that said complaint should be and is hereby dismissed. It is further adjudged that defendant recover of plaintiff their costs herein expended.

ROY M. SHELBOURNE,
Judge.

April 7th, 1951.

U. S. DISTRICT COURT,
WESTERN DISTRICT OF KENTUCKY. } ss.

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

W. T. BECKHAM,
Clerk,

(SEAL)

By S. G. CONNAUGHTON,
Deputy Clerk.

Dated: April 3, 1952.

No. 11,407

UNITED STATES COURT OF APPEALS

For the Sixth Circuit.

PAUL GINSBURG, *Appellant,* *vs.* CITIZENS FIDELITY BANK AND TRUST COMPANY, C. R. ALEY, W. R. COBB, J. MATT CHILTON, AND WILLIAM MARSHALL BULLITT, CHARLES I. DAWSON, JOHN E. TARRANT, R. LEE BLACKWELL, THOMAS W. BULLITT, EARL S. WILSON, THOMAS S. DAWSON, BERNARD H. BARNETT, RICHARD M. DAWSON, and GERALD KIRVEN, Doing Business as BULLITT, DAWSON AND TARRANT, *Appellees.*	Filed: Feb. 18, 1952. ORDER.

Before HICKS, Chief Judge; ALLEN and MCALLISTER, Circuit Judges.

The above cause coming on to be heard upon the transcript of the record, the briefs of the parties, and the argument of counsel in open court, and the court being duly advised,

Now, therefore, it is hereby ordered that the judgment of the district court be and is hereby affirmed on the grounds set forth in said judgment. The foregoing makes unnecessary any determination of the motion to strike appellant's supplemental brief.

Approved for entry:

/s/ THOMAS F. MCALLISTER,
Circuit Judge.

(SEAL)

A TRUE COPY.

Attest:

CARL W. REUSS,
Clerk.

By MARY M. MCAFEE,
Deputy Clerk.

23

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APR 4 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 655

PAUL GINSBURG,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF CHICAGO, AND ALFRED L. KUEHN,

Respondents.

BRIEF OF RESPONDENT, THE FIRST NATIONAL BANK OF CHICAGO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FRANK L. PAUL,

Attorney for Respondent, The First National Bank of Chicago.

THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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The petitioner filed three separate libel actions in the District Court. All complained of language contained in written objections to Ginsburg's petition in the highest court of the State of Kentucky asking that he be appointed *amicus curiae* in a case before that court. Two of these actions were based on the same objections, were consolidated in the District Court, and are here as cause No. 655. The other is here as cause No. 654. While petitioner has heretofore treated the two as separate actions because of the variance in language, the Court of Appeals found that

an identical question was involved and affirmed the District Court in each for the same reasons (R. 58). In this Court petitioner has filed the same petition for a writ of certiorari in both cases wherein he refers to the record in cause No. 654 as "Black" and in cause No. 655 as "First Nat.". We ask the Court's indulgence in adopting petitioner's reference to the record in No. 654 as "Black".

Opinions Below

The District Court ordered the Motion to Dismiss "allowed for the reasons set forth in defendant's written motion" (R. 28)* and rendered no opinion. The opinions of the Court of Appeals (R. 57, Black R. 44) are reported at 192 F. 2d 823, 826.

Jurisdiction

Plaintiff invokes the jurisdiction of this Court under 28 U. S. C. 1254.

Questions Presented

Where a complaint in libel attached the pleadings in a prior judicial proceedings wherein the complained of language appeared,

1. Whether the court correctly determined that language bore some relationship to the subject matter of the prior proceedings and thus was absolutely privileged.

2. Whether absolute privilege (even though it is a question of law for the court) may be raised by Motion to Dismiss when the facts appear on the face of the Complaint.

Statement

Plaintiff's libel actions germinated in February of 1950 when he filed a written petition in a case pending on appeal

* The written motion referred to appears at R. 23.

before the Court of Appeals of Kentucky asking that he be appointed *amicus curiae* (R. 11). His petition for appointment asserted that he was a resident of Pittsburgh, Pa., and was a member of the bars of the Supreme Court of Pennsylvania and the Supreme Court of the United States (R. 7).

The merits of that case prior to the filing of plaintiff's petition are not material here as the responsiveness of the objections must be tested by plaintiff's intervening petition. For the Court's information, however, it may be said that the suit involved a proposed sale of stock for $3,800,000 from a trust having six trustees to a corporate purchaser in which one of the trustees was interested. The beneficiaries of the trust, the trustees of the trust, and the personal representatives of the deceased settlor both in Florida and in Kentucky, were all parties. The trial court had approved the proposed sale and an appeal was pending before the Court of Appeals of Kentucky as it was important to the parties that a final adjudication be had as soon as possible.

At this point in the proceedings, the plaintiff filed his petition wherein he prayed that the Kentucky Court "appoint him, the said Paul Ginsburg, and permit him to act as, amicus curiae in this proceeding" (R. 11). The six trustees of the trust, among whom were the respondents herein, were represented by former Federal Judge Charles I. Dawson of Louisville (R. 13). Judge Dawson filed objections in the Kentucky court which among other things questioned Ginsburg's interest in the subject matter of the Kentucky proceedings in the language plaintiff complains of. The Kentucky court expressly held that Ginsburg did not want to file a brief on the questions before the court, was seeking to inject a new issue on appeal, was neither a

party nor attorney for any party to the proceeding, and was not shown to have any interest in the subject matter.*

Objections were filed to the attempted intervention and based on language in these objections plaintiff filed his libel suits. A Motion to Dismiss was sustained on all points by the District Court. The Court of Appeals concluded that one point alone, that of absolute privilege, was sufficient for an affirmance of the District Court.

While we do not feel the detailed facts involved in the Kentucky proceeding prior to the time of the filing of plaintiff's petition therein are germane to the Motion to Dismiss, we cannot overlook plaintiff's claim that the Motion admits the version thereof set forth both in his petition in the Kentucky court and in his libel action. In our opinion Ginsburg is bound by the adverse opinion of the Kentucky court which is reported in *Robertson et al.* v. *Hert's Adm'rs et al.*, 312 Ky. 405, 227 S. W. 2d 899, and the Motion admits only that the petition and objections attached to his libel complaint were actually filed in the Kentucky proceedings.**

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* The exact rulings of the Kentucky court on Ginsburg's intervening petition are quoted in point 2 of the Motion to Dismiss (R. 23).

**For example, see *McClure* v. *Stretch*, 20 Wash. 2d 460, 147 Pac. 2d 935 where it was expressly held that a demurrer to a libel complaint which did not charge irrelevancy of pleadings in a prior case (the instant complaints do not so charge) does not admit charges of falsity or maliciousness.

ARGUMENT

I.

This case does not involve any unusual or significant points of importance.

The petition for writ of certiorari is primarily addressed to the question of whether pleadings in a particular case, which contain complained of language, indicate absolute privilege on the face of the pleadings. This is a question which can arise only where the identical language is involved and would have little or no bearing in other cases not using that precise language.

Federal jurisdiction was bottomed on diversity of citizenship (R. 3) and the contention that both the District Court and the Court of Appeals did not correctly decide the case under local law applied to the particular facts is no different than would arise in an appeal on the merits had the case been filed in the State courts. The plaintiff has had his day in court and he alleges none of the grounds necessary for this Court to grant certiorari.

The local law involves the relevancy of pleadings filed in Kentucky to the subject of the litigation, for, if relevant, there can be no doubt they are absolutely privileged. If the complained of pleadings are relevant and therefore absolutely privileged, this is a question of law for the court and there is no unusual significant question in whether the court determines this on motion before or after answer.

This case accordingly revolves around the single question of whether the particular pleadings complained of were relevant to the subject of the Kentucky litigation. Relevancy, in turn, involves an examination of the complained

of language and the pleading to which it was addressed to determine whether the lower courts correctly so concluded.

II.

The opinion below is clearly correct in holding that under the law of Kentucky the complained of language was absolutely privileged.

Kentucky follows the general rule that statements in pleadings to be absolutely privileged need only have some relation to the subject under inquiry. It is not required that such statements be pertinent to the issue. In *Schmitt* v. *Mann,* 291 Ky. 80, 163 S. W. 2d 281, 283 (1942), the Court of Appeals of Kentucky states,

> "The prevailing rule and the one recognized in this jurisdiction is that statements in pleadings filed in judicial proceedings are absolutely privileged when material, pertinent and relevant to the subject under inquiry, though it is claimed that they are false and alleged with malice."

That this is the prevailing rule is recognized in the Restatement of Torts, section 587, comment (c):

> "c. *Relation of statement to proceedings.* It is not necessary that the defamatory matter be relevant or material to any issue before the court. It is enough that it have some reference to the subject of the inquiry. Thus while a party may not introduce into his pleadings defamatory matter which is entirely disconnected with the litigation, he is not answerable for defamatory matter volunteered or included by way of surplusage in his pleadings if it has any bearing upon the subject matter of the litigation."

The subject of the inquiry is disclosed by the prayer of Ginsburg's petition in the Kentucky court, namely, that he, "the said Paul Ginsburg" be appointed and permitted

to act as *amicus curiae* (R. 11). In view of the fact that the petition was silent as to the interest of a Pittsburgh attorney either in the subject matter before the Kentucky court or in the questions of law there involved (R. 6), it is difficult to conceive of a more pertinent comment on the subject under inquiry than the complained of language,

> "He is a mere interloper, without standing in this court, presumably looking for an opportunity to collect a fee in a case in which he has no interest whatsoever, either personally or as an attorney." (R. 4)

In other words, if Ginsburg asked the Kentucky court to appoint him, this was information the court should have before passing on such a request.

The complained of language not only refers to the subject under inquiry, which is all that the rule of absolute privilege requires, but it is also pertinent to the issue. The Court of Appeals correctly followed the Kentucky law.

III.

As a matter of pleading, where the moving party invokes the discretionary powers of a court, any response which might affect the exercise of that discretion, is pertinent.

Plaintiff seems to concede in his petition (p. 6) that his petition for appointment as *amicus curiae* was addressed to the uncontrolled discretion of the court.

There is an apparent logical distinction between cases where a person has a cause of action which he has a legal right to enforce and cases where the relief sought is a favor from the court. In the latter type it is clear that anything which might influence either the granting or withholding of the favor would be pertinent.

While we have been unable to find any Kentucky cases involving this distinction, it is generally established and un-

doubtedly would be there upheld if presented. Leading cases which uphold the pertinency of anything which might be believed to influence the exercise of a court's discretionary powers are *People* v. *Warden of City Prison,* 258 N. Y. 55, 179 N. E. 257 (1932); *Parker* v. *Kirkland,* 298 Ill. App. 340, 18 N. E. 2d 709 (1939); and *Brown* v. *Shimabukuro,* 118 F. 2d 17 (CA of DC, 1940). As the court succinctly stated in the *Parker* case (p. 717 of the N. E. 2d), "Parker's claims went to the root of his complaint, and if he were a credible person, actuated by good motives, the board might be swayed to grant the relief he prayed."

IV.

The complained of language refers to plaintiff's interest in the case. Even if it were "motive" it would be pertinent to the subject under inquiry.

Plaintiff assumes that the tag of "motive," which he places on the complained of language, automatically makes the language immaterial. Thus he cites from cases as to motive where the underlying facts indicate that a person with a valid cause of action has a legal right to enforce it regardless of his reasons for so doing. How different this is from the position of a person with no valid cause of action whatsoever, who is asking the court to let him intervene as a friend of the court.

The fallacy of the argument can likewise be demonstrated by illustration. In a tort case the injury of a person through fault of another can motivate the filing of suit. It is absurd to say that defenses consisting of a denial that person was injured and denial of wrong are irrelevant because they pertain to motive. Similarly, in the Kentucky case, the expectation of a fee to be allowed from the trust, could not only motivate plaintiff's attempt to intervene but it could also constitute his sole interest

in the proceeding. If it was his sole interest he should have informed the court and, not having done so, it was certainly proper for the respondents to do so.

The tag of "motive" affords no basis for any attempt to distinguish the opinion of the Court of Appeals. In the first place the complained of language obviously is more than motive; and in the second place, even if it were motive it was pertinent to the subject under inquiry. There is no failure correctly to follow Kentucky law.

V.

Where absolute privilege appears from the complaint, the law of Illinois permits dismissal on motion.

Section 45 of the Illinois Civil Practice Act (Smith Hurd Ill. Rev. Stats., ch. 110, sec. 169) specifically provides that "All objections to pleadings heretofore raised by demurrer shall be raised by motion."

In the case of *Ash* v. *Zwietusch*, 159 Ill. 455, 42 N. E. 455 (1896) a demurrer on the ground of absolute privilege was sustained in a libel suit based on an answer in a prior accounting suit which stated that until discovery of plaintiff's embezzlement of a large sum of money there never was any pretense the accounts were unsettled. The court said it readily appeared from a reading of the bill and answer, which were set out in the declaration in libel, that the matter complained of was not wholly irrelevant and impertinent to the controversy. A demurrer was similarly sustained in *Schwender* v. *Smith*, 152 Ill. App. 436 (1910).

In the case of *Parker* v. *Kirkland*, 298 Ill. App. 340, 18 N. E. 2d 709, 715, where a Motion to Dismiss was sustained, the court specifically held that "Under the well settled rules of pleading in this state this count is vulnerable to a motion

to dismiss which under the Practice Act takes the place of the former demurrer."

The plaintiff has relied on *Maclaskey* v. *Mecartney*, 324 Ill. App. 498, 58 N. E. 2d 630 (1944) for his conclusion a motion to dismiss would not lie in Illinois. This case was a libel suit based on a prior suit for court reporter's fees which was answered by an attack on the plaintiff's moral life, wholly unconnected with the unpaid fees. This attack was clearly irrelevant to the subject under inquiry and was so alleged to be irrelevant in the complaint. Not being relevant the rule of absolute privilege would not apply but the rule of qualified privilege might be available if in good faith it was believed the charges were material. It is this defense of qualified privilege which the court in the statement quoted in plaintiff's petition (p. 10) said was an affirmative defense. This is expressly so held in *Burdette* v. *Argile*, 91 Ill. App. 171, 177 (1900) which is cited by the court at the end of the quoted statement, where the court says, "If the defense that appellees in good faith believed it to be material and pertinent was relied upon, then it was an affirmative defense to be established by evidence, and no evidence to that end was presented."

It is of interest to note that the motion in the Maclaskey case was for an instructed verdict at the close of plaintiff's evidence. In *Haskell* v. *Perkins*, 165 Ill. App. 144 (1911) a similar motion was granted and sustained, the court saying (p. 150) "The question whether or not words and writings are actionable *per se*, and the question whether or not they are privileged are both questions for the court and not for the jury."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK L. PAUL,

Attorney for Respondent, The First National Bank of Chicago.